



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT III**

September 9, 2020

To:

Hon. Melissa R. Mogen  
Circuit Court Judge  
Burnett County Courthouse  
7410 County Rd. K  
Siren, WI 54872

Jacqueline O. Baasch  
Clerk of Circuit Court  
Burnett County Courthouse  
7410 County Rd. K, #115  
Siren, WI 54872

Gregory Bates  
Bates Law Offices  
P.O. Box 70  
Kenosha, WI 53141-0070

James Jay Rennie  
District Attorney  
7410 County Rd. K, #113  
Siren, WI 54872

Daniel P. Steffen  
Assistant District Attorney  
7410 County Rd. K, #113  
Siren, WI 54872

Mollie Grande Benson  
2057 Juliet Avenue  
Saint Paul, MN 55105-1725

You are hereby notified that the Court has entered the following opinion and order:

---

2020AP2

Burnett County Department of Human Services v. D. S.  
(L. C. No. 2017TP8)

Before Hruz, J.<sup>1</sup>

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Delilah appeals from an order terminating her parental rights to her son, Barry, and an order denying her postdisposition motion without a hearing.<sup>2</sup> Based upon our review of the

---

<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

parties' briefs and the appellate record, we conclude this appeal is appropriate for summary disposition, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

Barry was born on September 21, 2014. At the time of his birth, the Burnett County Department of Human Services (the Department) identified Barry as being a vulnerable child, due in part to Delilah being the subject parent in two child in need or protection or services (“CHIPS”) dispositional orders in an adjacent county. As a result, Barry was taken into custody a few days after his birth, prior to his discharge from the hospital. Barry was placed in various foster homes and was never in Delilah’s home or placed in her direct care following his birth.

On October 27, 2017, the Department filed a termination of parental rights (TPR) petition to involuntarily terminate Delilah’s parental rights to Barry. The Department asserted two grounds for termination: (1) “continuing CHIPS”; and (2) failure to assume parental responsibility. *See* WIS. STAT. § 48.415(2), (6).

A jury trial on the grounds to terminate Delilah’s parental rights was held on July 26, 2018. That same day, the circuit court declared a mistrial. The matter was then reset for a jury trial on February 19-20, 2019. After a two-day trial, the jury found that both grounds—i.e., continuing CHIPS and failure to assume parental responsibility—existed to terminate Delilah’s parental rights. Accordingly, Delilah was declared an unfit parent. On April 17, 2019, the court held a dispositional hearing and determined that the termination of Delilah’s parental rights was in Barry’s best interest.

---

<sup>2</sup> For ease of reading, we refer to D.S. and her son, B.A.S., using pseudonyms, rather than by their initials.

On January 23, 2020, Delilah moved this court to remand the matter for postdispositional proceedings, arguing remand was “necessary to preserve for appeal the testimony of trial counsel on an ineffective assistance of counsel claim and as to the circuit court’s decision to instruct the jury in the manner that it did in this case.” By our February 13, 2020 order, we granted her motion.

On February 21, 2020, Delilah moved the circuit court for postdisposition relief and requested an evidentiary hearing. She argued her trial counsel was ineffective by stipulating to the use of an amended version of the continuing CHIPS ground at her second grounds trial,<sup>3</sup> the court made “erroneous ... rulings in failing to grant a [second] mistrial,” and there was an “impermissible shifting of the burden of proof in this case.”

On March 30, 2020, the circuit court entered an order denying Delilah’s motion without a hearing. It concluded Delilah’s claims that the court erred by failing to grant a second mistrial and by shifting the burden of proof in this case lacked merit because she “failed to sufficiently apprise the court of an argument, does not cite any authority, and provided perfunctory and undeveloped arguments.”<sup>4</sup> The court further concluded that Delilah failed to prove her trial counsel provided ineffective assistance, determining that her counsel made strategic decisions and that, even assuming counsel was defective, Delilah failed to show a reasonable probability

---

<sup>3</sup> The Department petitioned for a TPR in October 2017. Our legislature, however, changed the continuing CHIPS ground’s elements in April 2018 when it passed 2017 Wis. Act 256, § 1, which amended WIS. STAT. § 48.415(2)(a)3. (2015-16). Delilah’s first jury trial proceeded under the preamendment version of the continuing CHIPS ground.

<sup>4</sup> Delilah abandons these two arguments on appeal.

that the outcome of her proceedings would have been different but for counsel's alleged deficient performance. Delilah now appeals.

Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights—the grounds phase and the dispositional phase. *Steven V. v. Kelley H.*, 2004 WI 47, ¶¶24-27, 271 Wis. 2d 1, 678 N.W.2d 856. Here, the issues Delilah raises on appeal concern only the jury trial during the grounds phase.

During the grounds phase of a TPR proceeding, “the petitioner must prove by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination of parental rights exist.” *Id.*, ¶24. If the petitioner proves at least one ground that it alleged in the TPR petition, then the circuit court must find the parent unfit. *Id.*, ¶25.

Here, the jury determined that the Department proved two grounds existed to terminate Delilah's parental rights—continuing CHIPS and the failure to assume parental responsibility. On appeal, however, the issues Delilah raises relate only to the continuing CHIPS ground. In particular, she argues: (1) the evidence presented at trial did not satisfy the requirements of the continuing CHIPS ground under either the pre- or postamendment version; and (2) her trial counsel provided ineffective assistance by stipulating to the use of the postamendment version of the continuing CHIPS ground for the second grounds trial and by failing to object to the insufficient evidence presented at trial, for the reason described above.

Assuming without deciding that Delilah's arguments are meritorious and that there was reversible error relating to the jury's finding on the continuing CHIPS ground, there remains another TPR ground that the jury found was proven at trial—i.e., her failure to assume parental responsibility. Delilah does not assert any error regarding the jury's finding on this ground.

That omission is fatal to her appeal because the circuit court was required to declare her an unfit parent as long as at least one TPR ground was proven at the grounds phase. *Id.* Under these circumstances, Delilah has no remedy on appeal by arguing an error occurred with respect to only one of the two TPR grounds.<sup>5</sup>

Delilah appears to somewhat acknowledge this notion in the final argument she raises on appeal; she asserts that “[t]he TPR verdict on the grounds of Failure to Assume Parental Responsibility was tainted by the accumulation of error in this case.” In Delilah’s view, we should reverse the order terminating her parental rights because “[i]t is entirely probable that the accumulation of error in [this case] suggest[s] that the real controversy has not been tried.”

This court may reverse an order where it appears from the record that the real controversy has not been fully tried or that it is probable that justice has for any reason miscarried. WIS. STAT. § 752.35<sup>6</sup>; *State v. Zdzieblowski*, 2014 WI App 130, ¶24, 359 Wis. 2d 102, 857 N.W.2d 622. Discretionary reversal under § 752.35 “should be used only in *exceptional* cases.” *State v. McKellips*, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258.

Delilah has not demonstrated that her case is exceptional. Indeed, her final argument is wholly undeveloped and conclusory. She does no more than summarily state that “error is

---

<sup>5</sup> We independently review the interpretation of WIS. STAT. § 48.415(6), the failure to assume parental responsibility ground, and that ground’s application to a given set of facts. *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶16, 333 Wis. 2d 273, 797 N.W.2d 854. We note that while the Department did not argue on appeal that we should affirm the TPR order because of Delilah’s failure to argue that there was error with both of the alleged TPR grounds, we conclude there is no error on the jury’s finding that Delilah failed to assume parental responsibility of Barry.

<sup>6</sup> Although Delilah cites to WIS. STAT. § 751.06, the statute pertaining to our supreme court’s discretionary reversal power, we observe that this court’s discretionary reversal power is granted by WIS. STAT. § 752.35.

present” because the jury was not properly instructed on the first element of the continuing CHIPS ground and that because most of the evidence at trial revolved around the continuing CHIPS ground, the real controversy was thus not tried.

Moreover, Delilah raises no issue regarding the jury’s verdict on the failure to assume parental responsibility ground. Her argument falls far short in persuading us that, assuming there was any error with regard to the jury’s finding on the continuing CHIPS ground, such error was so exceptional that it infected the jury’s separate finding on the ground of failing to assume parental responsibility. Accordingly, we have no basis on which to conclude that the real controversy was not fully tried or that justice was miscarried in Delilah’s TPR proceedings, such that her parental rights were improperly terminated on the ground of her failure to assume parental responsibility under WIS. STAT. § 48.415(6).

Therefore,

IT IS ORDERED that the orders are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

---

*Sheila T. Reiff*  
*Clerk of Court of Appeals*